INTERIOR BOARD OF INDIAN APPEALS

Niki Elofson-Gilbertson v. Northwest Regional Director, Bureau of Indian Affairs

37 IBIA 284 (06/24/2002)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

NIKI ELOFSON-GILBERTSON, Appellant	:	Order Reversing Decision
v.	:	
	:	Docket No. IBIA 01-91-A
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	June 24, 2002

Appellant Niki Elofson-Gilbertson seeks review of a January 22, 2001, decision issued by the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an alleged timber trespass on the Joe Sampson (Seamit) Allotment No. HC-3798-C. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision.

Appellant is a co-owner of the allotment at issue here. According to the Regional Director, the other co-owners are Arnold (a.k.a. Robert), Carlo (sic--it appears that this should be Carla), Mark, Melvin, and Patricia Elofson.

Appellant contends, and the Regional Director does not dispute, that the timber at issue here was located on the .5 acre of the Joe Sampson Allotment which constitutes Appellant's homesite. Her homesite was established and her home was built under the Mutual Help Housing Program of the Department of Housing and Urban Development (HUD). Appellant's .5-acre homesite is leased through the Lower Elwha Housing Authority. In order to participate in the HUD program, Appellant was required to obtain the consent of her co-owners to her exclusive use of the .5-acre parcel and to sign a Mutual Help and Occupancy Agreement (Agreement), which sets out her responsibilities toward the home and homesite as well as toward HUD and the Lower Elwha Housing Authority. Appellant states that each of her co-owners now also has a house on other parts of the allotment under the HUD program.

Appellant states that she decided to cut the trees because she believed they were unsafe and constituted a danger to her home, to her immediate family, to her nieces and nephews whom she cares for during the day, and to Seamit Road. Appellant admits that she did not ask BIA's permission to cut the trees. However, she states that she believed

she was responsible for any problem which the trees might cause under Article V, section 5.4(e), of her Agreement which requires her "[t]o keep the Home and such other areas as may be assigned to [her] for [her] exclusive use in a clean and safe condition." Under Article I, section 1.2, of the Agreement, "Home" is defined to mean "[t]he dwelling unit covered by this * * * Agreement, including the homesite." Several other sections of the Agreement also set forth requirements to maintain the home and property in a safe condition, and detail actions that can be taken against the homebuyer for failure to do so. Appellant states that she discussed removing the trees with the Lower Elwha Housing Authority Home Site Maintenance Inspector on May 15, 2000, and that the Inspector did not object to the removal of the trees.

This proceeding began with a visit to Appellant's homesite by a BIA forestry department employee. Although nothing in the administrative record shows why this visit was made, Appellant suggests in her notice of appeal to the Board that it resulted from a contact with BIA made by Arnold/Robert Elofson. Nothing before the Board shows the nature of this contact, or if it actually occurred.

The trees had already been cut at the time of the BIA employee's visit to the homesite. Appellant states that she asked the BIA employee to walk the perimeter of her homesite so that he could see that all of the trees cut were within her .5-acre homesite. According to her, he declined to do so (although he walked to at least one corner), stating that he was there only to scale the logs. Appellant asked him to sign a statement concerning what he did during his visit. The employee signed a statement for her, which Appellant has submitted in this proceeding.

The first document in the administrative record is a June 29, 2000, notice and poster of seizure of government property signed by the Superintendent, Olympic Peninsula Agency, BIA (Superintendent). The notice is addressed to Appellant and "all others whom this may concern." It states that the Superintendent has seized and taken into his possession

> 1870 board feet of Douglas-fir logs and 1 alder log (24 logs total) on the ground more or less; that said property has been heretofore unlawfully cut, severed or extracted from the lands of the said United States by trespassers; that said property is now in [the Superintendent's] possession as an officer of the United States, and is situated upon the following described lands, to wit: Western Washington Public Domain E ½ SE ¼ Section 10 Township 30 North Range 7 West, W.M., Joe Sampson (Seamit) Allotment No. HC3798-C, Clallam County, Washington.

June 29, 2000, Notice at 1. The notice did not cite BIA's authority for taking this action, but did inform Appellant of her right to appeal to the Regional Director.

Appellant filed a notice of appeal with the Regional Director. The notice of appeal did not provide specific arguments relating to the charge of timber trespass, but instead questioned the procedural propriety of the action because of the Superintendent's failure to notify Appellant's co-owners.

The group of documents in the administrative record immediately following Appellant's notice of appeal consists of notes about the visit of the BIA forestry employee to Appellant's property, and maps showing part of the allotment and the location of the trees that were cut. The record does not indicate the origin of these documents or when BIA received them. However, all but one of the documents are identical to documents submitted by Appellant.

The next group of documents in the record consists of a statement from Appellant and a response to Appellant's appeal, apparently from one of the co-owners of the allotment. The response, which supports Appellant, is signed, but the Board finds the first part of the signature illegible. Appellant's statement reads in its entirety:

> Removed trees on **my homesite**, located southeast of my home. The purpose being:
>
> A.) The removal of **danger trees** on my home site, which could hit my home, driveway, Seamit Road, trail to children's fort and fort area or yard in a windstorm or heavy snow.
>
> B.) Cougars roaming around my home: I watch my nieces and nephews daily.

Again, the origin and date of receipt of these documents is not noted in the administrative record.

The next document is a memorandum from the Regional Director to the Superintendent, stating that Appellant had not filed a statement of reasons and had not indicated that she intended to file one. The Regional Director informed the Superintendent that Appellant's time for filing had passed, but that the Superintendent could file an answer and should notify interested parties, i.e., the other co-owners, of the pendency of the appeal and inform them that they had a right to respond.

The Superintendent filed a response and informed the co-owners that they could also respond. In his response, the Superintendent indicated that he had acted under authority of 25 C.F.R. Part 163, which contains BIA's general forestry regulations. The Superintendent also stated that the logs had been removed from the allotment after he issued his notice of seizure.

The Regional Director issued the decision at issue here on January 22, 2001. He stated:

> The notice and seizure represented BIA action to halt an unlawful harvest and trespass of 1870 board feet of Douglas-fir and alder logs (24 logs total) on the Joe Sampson (Seamit) Allotment * * *. The Joe Sampson Allotment is Indian trust land under the jurisdiction of [the Olympic Peninsula Agency, BIA]. Federal law prohibits the harvest of timber on Indian trust land without approval of the Superintendent. * * *
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> This appeal is flawed from the start because appellant failed to submit a Statement of Reasons as required under 25 CFR 2.10(a). Appellant also failed to submit any documentary evidence supporting her appeal. As such, appellant has failed to meet her burden of proving why the Superintendent's notice and seizure might be in error. Accordingly, the appeal may be dismissed summarily as provided under 25 CFR 2.17(b)(1).
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> * * * [W]ithin his Answer of Interested Party, the Superintendent stated "Since this action was taken without any request for permit or other authority under 25 CFR 163 to remove these products, it was viewed as a trespass * * *." * * *
>
> Showing no proof to refute the Superintendent's determination of trespass, appellant is not persuasive in her appeal of either the "notice," or the fact of trespass. Appellant presents no evidence whatsoever to decide in her favor. The Superintendent's unrefuted testimony that appellant lacked the required BIA permit and approval establishes that the subject cutting of timber on the Joe Sampson Allotment is by definition a trespass. Appellant also fails to show how the Superintendent's actions constitute error and/or did not follow applicable regulations.
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> * * * The Superintendent should continue in his prosecution for unlawful trespass, following the regulations within 25 CFR 163.29, including the civil penalty for treble damages.

Jan. 22, 2001, Decision at 1-2.

Appellant appealed to the Board. Several of Appellant's co-owners filed statements with the Board in support of Appellant. The Regional Director did not file an answer brief.

Subsequent to the conclusion of briefing, the Board requested additional information. Both the Regional Director and Appellant responded.

The Board first addresses the Regional Director's statement that the appeal to him was subject to summary dismissal because of Appellant's failure to file a statement of reasons. It actually is unclear whether the Regional Director intended this to be the basis of his decision. He does not explicitly state that he is summarily dismissing the appeal, although the scant discussion and analysis in his decision make it appear that he did.

On a number of occasions with the same circumstances as are present here, the Board has explicitly rejected the contention that an appeal to a BIA Regional Director may be summarily dismissed. See, e.g., Reum v. Billings Area Director, 32 IBIA 37, 38-9 (1998); OK Tank Trucks, Inc. v. Muskogee Area Director, 31 IBIA 1, 2 (1997). 25 C.F.R. § 2.17, which deals with summary dismissal of appeals before a BIA official, provides in pertinent part:

> (b) An appeal under this part may be subject to summary dismissal for the following causes:
>
> (1) If after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents.

The Board has held that an appeal before a BIA official may not be summarily dismissed when an appellant has not been given an opportunity to amend her appeal documents. Reum, supra. Here, Appellant was not given such an opportunity. Therefore, her appeal was not subject to summary dismissal.

Furthermore, there are documents in the administrative record which show reasons for Appellant's appeal. As discussed above, these documents do not show the date they were received by BIA. However, they are located in the administrative record directly after Appellant's notice of appeal and before a memorandum to the Superintendent from the Regional Director stating that Appellant had not filed a statement of reasons. The administrative record is otherwise arranged chronologically. Under these circumstances, the Board declines to give the Regional Director the benefit of any

doubt as to when these documents were received. It therefore declines to hold that the documents were not filed with the Regional Director before the expiration of Appellant's time for filing a statement of reasons. Although the information in those documents is not extensive and is not presented as legal arguments, it does show reasons why Appellant believed she was entitled to cut the trees.

For these reasons, to the extent the Regional Director's decision constitutes a summary dismissal of Appellant's appeal to him, that decision is reversed.

In most cases in which the Board has found that a BIA Regional Director erred by summarily dismissing an appeal, it has remanded the matter for a decision on the merits. Here, however, the Board finds that it is appropriate for it to issue a decision in regard to BIA's action under 43 C.F.R. § 4.318, which authorizes the Board to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error.

The administrative record contains nothing indicating that the Superintendent ever informed Appellant of the authority under which he was charging her with timber trespass. The notice of seizure does not cite any statutory or regulatory authority. The first reference in the administrative record to any regulatory authority appears in the Superintendent's response to Appellant's appeal to the Regional Director, in which the Superintendent refers to 25 C.F.R. Part 163. There is no indication that the Superin-tendent properly served his response on Appellant and the other interested parties as he was required to do by 25 C.F.R. § 2.12(a). The Superintendent's failure to inform Appellant of the regulations under which he was acting deprived her of the opportunity to challenge that authority before the Regional Director.

In his decision, the Regional Director gave Appellant the first indication of the authority BIA claimed to be exercising in taking action against her. He quoted the Superintendent's reference to Part 163, and held that the Superintendent should continue with prosecution for timber trespass under 25 C.F.R. § 163.29.

For purposes of this decision, the Board assumes that BIA was acting under 25 C.F.R. Part 163.

25 C.F.R. § 163.1, defines "forest" or "forest land" to mean

> an ecosystem at least one acre in size, including timberland and woodland, which: Is characterized by a more or less dense and extensive tree cover; contains, or once contained, at least ten percent tree crown cover, and is not developed or planned for exclusive non-forest resource use.

The Board finds that the administrative record in this case does not support a conclusion that the trees were cut from a "forest" or from "forest land" within the meaning of 25 C.F.R. § 163.1. In particular, BIA has not shown that, for purposes of the application of Part 163, Appellant's homesite should be treated as part of the entire allotment rather than as a .5-acre parcel carved from the allotment for her exclusive use under the HUD housing program and by agreement of her co-owners. If the .5-acre parcel should be treated separately from the entire allotment, the regulations in Part 163 would not apply to it because it is less than one acre in size. Alternatively, BIA has not shown that, if the entire allotment is the appropriate acreage to be considered, the allotment has the requisite tree cover, or that it "is not developed or planned for exclusive non-forest resource use." Appellant contends that portions of the allotment have been set aside as homesites for each of the co-owners. BIA has not disputed this contention, and has not shown that, despite this division and apparent use of the allotment for residential purposes, the allotment still meets the definition of "forest" or "forest land."

When, as here, the application of a particular set of regulations to a particular situation is not obvious, it is incumbent on BIA to show that the regulations actually apply to the situation. In the absence of any attempt by BIA to demonstrate in the administrative record or in filings with the Board that 25 C.F.R. Part 163 applies, the Board cannot sustain action taken under that Part.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's January 22, 2001, decision is reversed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge